IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 924 of 1996

in

SPECIAL CIVIL APPLICATIONNo 2735 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and sd/-
MR.JUSTICE R.BALIA. sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

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2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

, 2, 3, 4

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5. Whether it is to be circulated to the Civil Judge? No

KARSANJI CHATRAJI HADIYOL

Versus

JASUBEN RAMSINGJI PARMAR

Appearance:

MR VIPUL S MODI for Petitioner

MR JP PARMAR with Mr.P.M.Thakkar,Sr.Counsel for Respondent No. 1, , 3, 4

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE R.BALIA.

Date of decision: 07/11/96

ORAL JUDGEMENT (Per R.Balia,J.)

This Letters Patent Appeal against order dated 1st July 1996 in Special Civil Application No.2735 of 1996 has arisen in the following circumstances.

2. The appellant had married to respondent no.1 in 1968 after the expiry of his first wife and has 3 children from the 2nd marriage, who are respondents nos.2 to 4. It appears that the marriage has suffered rough weather and the appellant estranged with second wife is living separately from his second wife and children from second marriage. On 19-11-1985, respondent no.1 Jashuben filed a Criminal Misc.Application underSec.125 of the Code of Criminal Procedure, 1973 on her behalf as well as on behalf of the children and after reply of the appellant was received on 29th June 1986 an order for interim maintenance was made directing the appellant to pay Rs.300/- per month in respect of the four respondents. The application under Sec.125 came to be decided finally on 3rd February 1995, by which the claim of the respondents for maintenance was upheld. The quantum of maintenance was fixed at Rs.1,350/- in all. It was ordered that the maintenance amount as finally determined, is payable from the date of the application. The individual determination of the maintenance was Rs.500/- for wife-respondent no.1, Rs.300/- each for Son Chandansinh and daughter Surya, respondents nos.2 & 3 and Rs.250/-for daughter Antarben, respondent no.4. He passed further order that maintenance was payable to Chandansinh upto 5-3-1989, Surya upto 16-8-1993 and Anderben upto 16-11-1997 respectively upto the date of attaining the age of majority by the children of the appellant before us.

3. Aggrieved with the order, the appellant preferred a Revision Application before the Sessions Judge at Palanpur, who, by his order dated 11th March 1996, dismissed the revision and confirmed the order passed by the Judicial Magistrate.

4. The petitioner filed a petition under Articles 226 and 227 of the Constitution of India before this Court for issuing a writ of certiorari questioning the final order of maintenance awarded in the proceedings under Sec.125 of Cr.P.C. The learned single Judge, after considering various aspects of the matter, was not inclined to entertain the petition under Article 226 or its supervisory jurisdiction under Article 227 and

interfere with the final order of maintenance. About the prayer for grant of instalments, the appellant was left to take appropriate plea before the Judicial Magistrate in the Execution Proceedings under Sec.125(3) of Cr.P.C.

5. It was strenuously urged by the learned Counsel for the appellant that learned single Judge seriously erred in rejecting the petition in limine by holding it to be not maintainable. It was urged that judicial review of any administrative order affecting the right of the person or judicial or quasi judicial orders passed by any Tribunal or Court, is the basic feature of the Constitution and there cannot be any jurisdictional embargo on the maintainability of the petition under Articles 226 & 227 of the Constitution.

6. This contentions need not detain us long. The principle needs hardly to be elaborated that maintainability of the petition under Article 226 or Article 227 is not to be viewed from the point of view whether the High Court has jurisdiction to entertain the petition or not or a petitioner can move this Court under Article 226 or 227 in a particular matter or not. But, it is primarily a case of exercise of discretion whether to invoke extra ordinary jurisdiction to issue any writ order or direction under Art.226 in any particular matter or to exercise power of supervisory jurisdiction under Art.227 in a particular case or not. If the order is read as a whole, we find that at no point the learned single Judge has come to any such conclusion that no such petition can be filed or the Court cannot, in any circumstances entertain, the petition challenging the orders like the one in question. In each case, it depends upon the discretion to be exercised by the High Court whether to entertain a petition under Article 226 or 227, keeping in view the facts and circumstances of the case. The learned Judge has clearly examined the issue raised before him from this point only. It is apparent from the following observation in the order under appeal.

> "The extra ordinary remedy can be invoked only in the exceptional circumstances where these is a case of gross abuse or the order is wholly without jurisdiction".

We find that learned single Judge has not thought it fit, in his discretion, in the facts and circumstances of the present case, to entertain the petitioner's grievance raised in the petition on the ground that Sec.125 Cr.P.C. provides for summary remedy for claiming

maintenance against husband or guardians or person responsible for maintenance of the claimants, for the sustenance of those who are in need of it and have claim to it. In keeping tune with the objective only summary procedure has been provided to be followed and no right of appeal has been conferred under the Statute, but general power or revision under Sec.397 read with Sec.401 Cr.P.C. is available to be invoked by the aggrieved party. That remedy has been availed of by the present appellant with no success. When designedly the Legislature has not provided for multi-tiered remedies to review the order passed by the Judicial Magistrate under Sec.125, the extra ordinary remedies available under the provisions of the Constitution cannot be passed as a substitute for usual remedies not provided under the statute. In absence of any statutory remedies available in the statute, the petition may not be kept out of consideration on the ground of availability of alternative remedy or availing of alternative remedy before approaching High Court for invoking extra ordinary jurisdiction. However, this does not detract from the fact that the exercise of jurisdiction to issue the writs in exercise of such power is still governed by well known general principles, ordinarily in such matters, the Court does not examine the orders challenged as an appellate Court nor it sits over to examine the correctness of the finding of fact arrived at by the authorities concerned, by appreciating available evidence for substituting its own conclusion therefrom. It is in light of these principles and keeping in view the fact that extra ordinary remedy can be invoked only in exceptional circumstances where there is a gross abuse of authority or the order is wholly without jurisdiction. Another principle of significance is that even if there is some substance in legal issues raised, the Court may yet not interfere, if there is no substantial failure of justice. Reference in this connection may be made to A.V.Venkateswaran vs. Ramchand Sobhraj Wadhwani reported in AIR 1961 S.C. 1506 wherein The Court while considering the question about jurisdiction of High Court to entertain writ petitions in case of availability of alternative remedy said as under:

> We need add only that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus preeminently one of

> discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

In the case of Balvantrai Chaimanlal Trivedi, vs. M.N.Narashna and others reported in 1960 SC 407, the apex Court while finding substance in the plea about lack of jurisdiction, refused to interfere with the order as there was no failure of justice by saying "as we are not satisfied that the justice of case requires interference in the circumstances, we should refuse to interfere with the order of the High Court dismissing the writ petition of the appellant.

The learned single Judge has not found the case of such category to invoke the extra ordinary jurisdiction under Article 226 or 227. We are in full agreement with the reasons which weighed with the learned single Judge for not to invoke extra ordinary jurisdiction in the present case.

7. Learned Counsel for the appellant vehemently urged that the present is a case of patent lack of jurisdiction inasmuch as the learned Judicial Magistrate having once made an order of interim relief by way of interim order on 29-6-1986, was left with no jurisdiction to pass an order of maintenance finally to be effective from the date of application. The foundation of this argument according to learned Counsel, is that the order of interim maintenance itself being an order under Sec.125 of Cr.P.C. it could be reviewed or modified from time to time if the exigency of the situation so demands, on an appropriate application. Any subsequent order determining maintenance only amounts to reviewing the decision as to quantum of maintenance fixed by way of interim order and can be effective only from future date. According to him, the order of interim maintenance covers the period under final order is made and is of the nature of modification of interim order. Therefore, no occasion arises for the Court to make a final order for the period covered by the order of interim maintenance.

8. This argument has been stated to be rejected The very fact that the Court which has jurisdiction to pass a final order can make an interim order in that respect, envisages within it that interim order is subject to final orders and is only provisional until final orders are made. If final order is at a variance from the interim order made, it cannot be said that such variance

is without jurisdiction because it alters the situation during the pendency of litigation which was in existence after the interim order was made. To illustrate in a suit for mesne profits for use and occupations of any immovable property, when the claim is disputed including the rate at which mesne profits are claimed, the Court makes an interim order in order to protect the interest of claimant directing the person in possession to pay certain amount regularly different from the one claimed during the pendency of suit, can it be said that when finally suit is decided and proceedings culminate in decree, the Court cannot direct the payment of mesne profits at a rate different from the one awarded by way of interim orders from the date of suit because mesne profit for use and occupation during the pendency of suit stands covered by order of payment of interim mesne profits? Answer must be in plain negative.

9. Moreover Section 125(2) clearly postulates that in absence of any direction, the order of maintenance takes effect from the date of making of the order, but the Court has jurisdiction to make that order effective from the date of application. This clearly postulates that Sub-Section 2 speaks about the final orders of maintenance and the date of its becoming operative. As a matter of fact, because of this provision, a controversy had arisen that when the Court has power to make an order for maintenance and make it effective from the date of application in its discretion, no power vests in the Court for making an order for interim maintenance. That contention was negatived by the Supreme Court in Savitri vs. Govindsingh Rawat, AIR 1986 Supreme Court 984. Placing reliance on certain observations made in the judgment that the Court has power to make an order of maintenance under Sec.125 Cr.P.C. itself, the learned Counsel wanted to carry it further that order of interim maintenance being an order under Sec.125 and having become effective, the second part of Sec.125(2) becomes inoperative from that date.

10. We are not able to read any such proposition in the said judgment. On the contrary, the Court has clearly stated that:

"having regard to the nature of the jurisdiction exercised a Magistrate under Sec.125, the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to pending final

disposal of the application."

This clearly postulates that interim maintenance is only a provisional maintenance subject to final determination and is subject to other conditions. Necessarily, the other conditions would include the conditions which comes into existence at final disposal of the application which takes into its sphere the liability of the respondent to maintain the applicant and the quantum of the maintenance amount to be paid to the applicants and the date from which such maintenance is to be paid to the applicant, last of which includes determination of question whether the maintenance is to be paid from the date of the order or from the date of the application. The determination of maintenance payable by way of interim maintenance is also subject to final determination and it cannot be read by any stretch of imagination that as far as quantum of interim maintenance is concerned, it becomes final for the period during which the application remains pending.

11. Apart from this issue, no question as to the jurisdiction of the Judicial Magistrate has been raised. The other contentions which have been raised by the learned Counsel for the appellant are about the correctness of finding about quantum of maintenance . As has been discussed by the learned single Judge, to which we agree, this is not a Court of appeal to examine finding of fact by appreciating and evaluating the evidence as that does not involve any question of jurisdiction. Such recourse can be taken only in case where gross error is pointed out and the conclusion is such which can be said to be so unreasonable or perverse to which no man of ordinary prudence will reach. We are of the opinion that this is not a case of that nature to require further inquiry.

12. We, therefore, find no force in this appeal. It is dismissed with cost. Cost is quantified at Rs.2,500/-. The amount which is deposited with the Registry during pendency of these proceedings before this Court to be adjusted against the amount recoverable by the respondents under the order under Sec.125 is permitted to be withdrawn by respondent no.1.

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